

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN GAGE & MACHINE CO.,
SIZE CONTROL DIVISION, *et al.*

Defendants.

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) C.A. No. 1:11-cv-04791
) Honorable Robert M. Dow, Jr.
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MEMORANDUM IN SUPPORT OF THE UNITED STATES’
UNOPPOSED MOTION TO ENTER CONSENT DECREE

I. INTRODUCTION

Plaintiff, the United States of America, on behalf of the U.S. Environmental Protection Agency (“EPA”), respectfully requests that this Court enter the proposed Consent Decree lodged on August 27, 2013 with the Court in this action (Dkt. # 46-1)(for the Court’s convenience a copy of the lodged Consent Decree is also attached to the United States’ Motion to Enter). If approved by the Court, the Consent Decree would resolve the United States’ cost recovery claims relating to the U.S. Scrap Site in Chicago, Illinois (the “Site”) against the Defendants who are contributing toward reimbursing the response costs the United States incurred at the Site.

In its complaint filed under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) on July 15, 2011, the United States sought reimbursement of response costs incurred at or in connection with the release or threatened release of hazardous substances at the Site, and a declaratory judgment under Section 113(g)(2) of CERCLA, 42

U.S.C. § 9613(g)(2), and that Defendants are jointly and severally liable for any future response costs incurred by the United States in connection with the Site.

On August 27, 2013, the United States lodged the proposed Consent Decree with this Court, and filed a Notice of Lodging to inform the Court that 30 days public notice of the proposed consent decree (in the Federal Register) is required, and that the United States would move for entry of the decree after the comment period expired, and after considering any public comments filed. (Dkt. # 46 & 46-1). The Federal Register published notice of the proposed decree on September 3, 2013, *See* 78 Fed. Reg. 54276, and the public comment period expired on October 4, 2013. The United States received no comments on the proposed consent decree.

II. THE PROPOSED CONSENT DECREE

The proposed Consent Decree resolves the pending claims against the seventeen companies named in the United States' complaint ("Settling Defendants"). Dkt. # 1. Under the terms of the proposed Consent Decree, Settling Defendants collectively shall reimburse the United States \$1.71 million of its past response costs (See proposed consent decree ("CD") ¶ 4), and shall provide certain covenants to the United States which are standard in CERCLA settlements (See CD ¶¶ 16- 22). In exchange, each Settling Defendant shall receive a covenant not to sue for past response costs under Section 107(a) of CERCLA, provided each contributes at least the amount set forth in Appendix B and that the United States is paid the full \$1.71 million joint payment. (See CD ¶¶ 4, 14 & App. B). The United States' covenant not to sue is subject to certain conditions and reservations of rights. (See CD ¶ 15). The Consent Decree also grants each Settling Defendants protection from contribution actions or claims by third-parties for "matters addressed" in the Consent Decree provided the Settling Defendant has paid at least the

amount required by Appendix B and the United States is paid the full \$1.71 million joint payment. *Id.* ¶ 24.

The proposed Consent Decree is expressly conditioned upon the United States seeking public comment on whether the settlement is appropriate. (See CD ¶ 33). The United States received no comments on the proposed consent decree, following publication in the Federal Register.

Because the Consent Decree is fair, reasonable and consistent with the goals of CERCLA, this Court should enter the Consent Decree.

III. THE COURT SHOULD ENTER THE CONSENT DECREE BECAUSE IT IS FAIR, REASONABLE, AND CONSISTENT WITH THE PURPOSES OF CERCLA

A. The Court Must Apply a Deferential Standard of Review

A court's role in reviewing a settlement under CERCLA is to "satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 85 (1st Cir. 1990), *quoting* H.R. Rep. No. 99-253, pt. 3, at 19 (1985); *United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011). This standard of review is consistent with the standard of review that pertains to consent decrees generally. *See Air Line Stewards and Stewardesses Ass'n, Local 550 v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1167 (7th Cir. 1980) (settlements should be "fair, reasonable and adequate"); *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 307-08 (7th Cir. 1985).

In making its determination regarding a proposed settlement, the Court "must defer to the expertise of the agency [that negotiated the proposed settlement] and to the federal policy

encouraging settlement.” *Whiting Paper*, 644 F. 3d at 372, citing *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 207 (3rd Cir. 2003); *see also, Securities & Exchange Comm’n v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984). The underlying purpose of the Court’s inquiry is to determine whether the decree adequately protects the public interest. *See United States v. City of Evansville, Indiana*, No. 3: 09-cv-128-WTL-WGH, 2011 WL 2470670 * 4 (S.D. Ind. June 20, 2011), citing *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1049-50 (N.D. Ind. 2001).

As demonstrated below, the Court should approve and enter the Consent Decree because it is fair, reasonable, consistent with the goals of CERCLA, and in the public interest because it requires Settling Defendants to pay an appropriate amount of response costs.

B. The Consent Decree Is Fair

The fairness inquiry includes both procedural and substantive fairness. *See, e.g., United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 907 (E.D. Wis. 2004) (citing *Cannons*, 899 F.2d at 86). The former inquiry addresses whether the negotiation was open and at arms-length. *See, e.g., BP Exploration & Oil Co.*, 167 F. Supp. 2d at 1051. This requirement is satisfied as long as the consent decree is lodged for public comment and there is no bad faith or collusion in negotiations. *Id.* at 1052-53. Here, the Consent Decree was lodged for public comment and was negotiated at arms-length and in good faith by experienced counsel. The Consent Decree has the valid consent and authorized signature of each party. For these reasons, the Consent Decree is procedurally fair.

The Consent Decree is also substantively fair. The starting point for the substantive fairness inquiry is usually the comparative fault of the entities involved in the contamination. *See, e.g., Cannons*, 899 F.2d at 87-88. The Consent Decree is substantively fair because, it holds

Settling Defendants accountable for contributing to the contamination at the U.S. Scrap Site, and requires them to pay a significant portion of the response costs that the United States incurred in performing a “removal action” aimed at preventing the migration of contaminants from the Site. Here, Settling Defendants collectively will pay \$1.71 million of the approximately \$2.6 million in costs associated with the EPA removal action in return for receiving a covenant not to sue and contribution protection for those costs.

The settlement also accounts for certain litigation considerations that might have impacted the United States’ ability to fully recover all costs associated with removal action. Given these litigation considerations the settlement is substantively fair.

C. The Consent Decree Is Reasonable and Consistent With the Purposes of CERCLA

The Consent Decree is reasonable and in the public interest. In evaluating reasonableness, courts look first to the agreement’s expected effectiveness in cleaning the environment, whether it appropriately compensates the public, and the relative strength of the parties’ litigation positions. *Fort James*, 313 F. Supp. 2d at 910. In this case, the Consent Decree is reasonable because it maximizes the public’s recovery from the Settling Defendants.

Moreover, the Consent Decree is consistent with statutory purposes. CERCLA aims to ensure that responsible parties pay for the cleanups necessitated by their activities, while also favoring settlements where possible. *Fort James*, 313 F. Supp. 2d at 911. Here, the Consent Decree provides for recovery of \$1.71 million of EPA’s removal action costs incurred at the U.S. Scrap Site.

IV. CONCLUSION

For the reasons stated above, the proposed Consent Decree is fair, reasonable, adequate, and consistent with the purposes of CERCLA. Accordingly, the United States respectfully requests that the Court execute the proposed Consent Decree now lodged with the Court (See Dkt. # 46-1), and enter the Decree as a final judgment in this action. No proposed order is attached because there is a signature block for the Court to execute on page 12 of the Consent Decree.

Respectfully submitted,

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October 29, 2013

/s/ Lisa A. Cherup
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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2013, a copy of the foregoing Motion for Entry of Proposed Consent Decree was filed electronically. Notice of this filing will be sent to the parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Lisa A. Cherup
Lisa A. Cherup
Trial Attorney